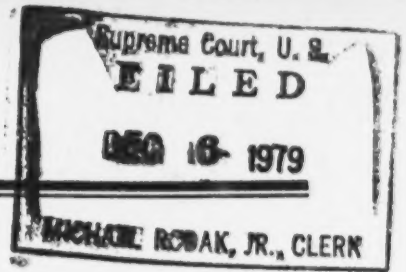


APPENDIX



IN THE
Supreme Court of the United States
OCTOBER TERM, 1979

NO. 79-67

WILLIAM WALTER,
Petitioner,
v.
UNITED STATES OF AMERICA,
Respondent.

NO. 79-148

ARTHUR RANDALL SANDERS,
Petitioner,
v.
UNITED STATES OF AMERICA,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITIONS FOR CERTIORARI FILED JULY 16, 1979
CERTIORARI GRANTED OCTOBER 15, 1979

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SUMMARY OF RELEVANT DOCKET ENTRIES

<u>Date</u>	<u>Description of Document or Proceeding</u>	<u>Doc. No.</u>
4/6/77	Indictment returned (11 counts.	1
5/31	Defendant Sanders thru his trial counsel adopts all other motions filed by counsel for William Walter.	11
5/31	Consolidated motion to dismiss (Sanders).	14
5/31	Memorandum of points and authorities in support of consolidated motion to dismiss (Sanders)	15
5/31	Memorandum in support of motion to suppress evidence and return property illegally seized (Sanders)	16
5/31	Motion to suppress evidence and return property illegally seized (Sanders).	17
6/3	Motion for the return of seized property and the suppression of evidence; memorandum of points and authorities in support thereof (Walters.	18
6/3	Motion to compel election as to whether alleged appeal to prurient interest of questioned material is to average adult or to member of clearly defined deviant sexual group; memorandum of points and authorities in support thereof Walter).	19

<u>Date</u>	<u>Description of Document or Proceeding</u>	<u>Doc. No.</u>
6/3	Notice of motion and motion for severance; points and authorities and affidavits in support thereof. (Walter)	20
6/3	Motion to dismiss the indictment; memorandum of points and authorities in support thereof (Walter)	22
6/3	Motion for change of venue, memorandum of points and authorities and affidavit. (Hearing and oral argument requested (Walter)).	24
6/3	Adoption by Defendant Walter of co-defendants' pretrial motions.	26
6/17	Order: Motion to compel election of counts and to dismiss remaining counts - denied. Notice of motion and motion for severance - denied. Motion to strike surplusage - denied. Motion to dismiss based on array of jurors - denied.	27
7/8	Governments opposition to defendants motion for change of venue.	33
7/8	Governments response to defendants consolidated motion to dismiss.	34
7/8	Governments response to defendants motions to suppress and return evidence.	36
7/8	Governments response to defendants motion to dismiss.	37
7/19	Governments response to defendant Walter's motion to compel election regarding standard of appeal to prurient interest.	38

7/19	Motion for continuance, affidavit of W. Michael Mayock in support of continuance (Walter)	39
8/2	Proceedings: Hearing on pending motion. Governments witnesses sworn. Defendant witnesses sworn. Government exhibits 1, 2 and 3 in evidence. Defendants exhibits A and C in evidence. Defendants motion for continuance - denied. Hearing in recess until 9:00 A.M. August 9, 1977.	
8/5	Order; Consolidated motion to dismiss the indictment, filed 5/31/77 is denied. Motion to compel election as to whether alleged appeal to prurient interest of questioned material is to the average adult or to members of clearly defined deviant sexual groups is denied.	42
8/5	Motion to dismiss the indictment, filed 6/3/77 is denied. To the extent the motion seeks dismissal based on former jeopardy it is denied without prejudice to renewal subsequent to trial. The motion for change of venue is denied. The motion to dismiss or in the alternative to recuse the U.S. Atty's office is denied. The motion to transfer the case to the Hon. Ben Krentzman, is denied. The motion for a continuance of trial, made on the record in open court 8/2/77 is reaffirmed and the motion is denied. The court reserves ruling on defendants' motion to suppress and for return of the seized property pending the conclusion of the hearing on 8/9/77 at 9:00 AM.	

- 8/9 Hearing on motion to suppress. Motion for return of property - ruling reserved. Motion to suppress = denied.
- 8/10 Motion in limine to prohibit any reference to or use of defendant's guilty plea to similar obscenity charges; exhibits. 44
- 8/10 Proceedings of trial by jury; Jurors challenged for cause; Jury selected - not sworn. Court recessed until 9:30 A.M. 8/11/77.
- 8/11 Proceedings: Trial by jury resumed from 8/10/77. Jury sworn. (9:30 AM). Rule invoked. Government opening statement. Defendant Walter opening statement. Defendant Sanders, Gulf Coast News Agency, Inc. and Trans World America, Inc. opening statement. Government witnesses sworn. Government exhibits 6, 6A, 8A, 9A, 10A, 11A, 17A, 13 in evidence. Court recess until 9:30 AM, 8/12/77.
- 8/12 Trial by jury resumed from 8/11/77. Government witnesses. Government exhibits 1 thru 5, 7, 15, 17, 17A, in evidence. Defendant exhibits 1 in evidence. Court recessed until 9:30 AM 8/15/77.
- 8/15 Trial by jury resumed from 8/12/77. Juror #47 excused. Juror #159 seated in place. Government witnesses sworn. Showing of exhibits 1 thru 5. Defendant witness sworn. Government exhibits: 13A, 16, 16A, 16B, 18, 19, 20 in evidence. Court in recess until 9:30 AM, 8/16/77.

- 8/16 Trial by jury resumed from 8/15/77. Government witnesses sworn. Government rests. Defendant Walter's motion for judgment of acquittal - denied. Defendants Sanders' motion for judgment of acquittal - denied. Defendant witnesses sworn.
- 8/16 Recessed until 9:30 AM 8/17/77
- 8/17 Trial by jury resumed from 8/16/77. Defendant's witnesses sworn. Defendants rest. Government rebuttal witnesses sworn. Both sides rest. Court in recess until 9:00 AM 8/18/77.
- 8/18 Trial by jury resumed from 8/17/77. Defendants' motion for judgment of acquittal - denied. Charge conference. Government closing argument. Motion for mistrial - denied. Defendant Walter's closing argument. Defendant Sanders' closing argument. Government rebuttal argument. Jury instructions. Jury retired to deliberate. Court in recess until 9:30 AM 8/19/77.
- 8/19/ Trial by jury resumed from 8/18/77. VERDICT AS TO DEFENDANT SANDERS: Guilty as to Counts 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11. 44A
VERDICT AS TO DEFENDANT WALTER: Guilty as to Counts 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11. 44B
VERDICT AS TO GULF COAST NEWS AGENCY: Guilty as to each of 11 counts as charged. 44C
VERDICT AS TO TWA: Guilty as to Count 1. 44D
Jury polled - all agreed. Adjudication deferred as to each defendant. To be sentenced at 9:30 AM 9/30/77.
- 8/19/ Defendants consolidated proposed jury instructions. 45

8/19	Governments proposed instructions.	45A
9/9	Defendants' requested voir dire examination (Walter).	46
9/9	Questions proposed by defendant, Arthur Sanders, to be asked to prospective jurors on voir dire.	47
9/9	Governments voir dire questions.	48
9/19	Court's instructions to the jury.	
9/16	Motion for judgment of acquittal; memorandum of points and authorities in support thereof (Walter).	50
9/16	Motion for new trial; memorandum of points and authorities in support thereof; affidavit of W. Michael Mayock in support thereof (Walter)	51
10/7	Governments opposition to defendant's motion for new trial and judgment of acquittal	53
10/12	Order: Defendants' motion for extension of time in which to file post-trial motions - granted. Defendants motion for a new trial - denied. Defendants motion for judgment of acquittal - denied. Court reserves ruling until sentencing on Grassi's motion to withdraw his guilty plea. Sentencing continued and rescheduled for 10/21/77 at 9:30 AM.	54
10/21	SENTENCE (Walter): Adjudication of guilt made as to Counts 1 thru 11. 3 years as to Ct. 1, 3 yrs. as to Cts. 2 thru 11 concurrent with each other and with sentence imposed in count 1. Sentence imposed pursuant to Title 18, Sec. 4205(b)(2) USC.	

	Defendant advised of right to appeal. Bond continued.	55
10/21	SENTENCE (Sanders); Adjudication of guilt made as to Counts 1 thru 11. 3 yrs. as to Ct. 1, 3 yrs. as to Counts 2 thru 11 concurrent with each other and with sentence in count 1. Sentence imposed herein pursuant to Title 18, USC, Sec. 4205(b)(2). Defendant advised of right to appeal. Bond continued.	56
10/21	SENTENCE (Gulf Coast News Agency, Inc.): Adjudication of guilt made as to Counts 1 thru 11. Fine of \$3,000.00 as to each of Counts 1 thru 11 consecutively. (Total fine \$33,000) Fine stayed pending appeal. Defendant advised of right to appeal.	57
10/21	SENTENCE (Trans World America, Inc.): Adjudication of guilt made as to Count 1. Fine of \$10,000.00, stayed pending appeal. Defendant advised of right to appeal.	58
10/21	Notice of Appeal (Walter)	59
10/26	Notice of Appeal (Sanders)	64
10/26	Notice of Appeal (Gulf Coast News Agency, Inc.).	65
10/26	Notice of Appeal (Trans World America, Inc.)	66

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

UNITED STATES OF AMERICA

V.

WILLIAM WALTER, RICHARD WILLIAM
LARSON, ARTHUR RANDALL SANDERS, JR.,
MICHAEL JOHN GRASS, JR., GULF COAST
NEWS AGENCY, INC., TRANS WORLD
AMERICA, INC., a/k/a TWA, INC.

Case No. 77-49-Cr-T-11

4/6/77

The Grand Jury charges:

COUNT ONE

From on or about April 6, 1973, and continuing up to and including the date of this indictment, in the middle District of Florida, and elsewhere, WILLIAM WALTER, RICHARD WILLIAM LARSON, ARTHUR RANDALL SANDERS, JR., MICHAEL JOHN GRASSI, JR., GULF COAST NEWS AGENCY, INC., and TRANS WORLD AMERICA, INC., a/k/a TWA, INC., defendants herein, unlawfully, wilfully,

and knowingly did combine, conspire, confederate, agree, and have a tacit understanding with each other and with other co-conspirators known, but not named as defendants in this indictment, together with other persons whose names are unknown to the Grand Jury, to:

1.

Knowingly transport and cause to be transported in interstate commerce by common carrier and express companies obscene, lewd, lascivious, and filthy books, pamphlets, pictures, and motion pictures, in violation of Title 18, United States Code, Section 1462.

2.

Knowingly transport in interstate commerce for the purpose of sale and distribution obscene, lewd, lascivious, and filthy books, pamphlets, pictures and films, in violation of Title 18, United States Code, Section 1465.

All in violation of Title 18, United States Code, Section 371.

It was further part of said conspiracy that the defendants, WILLIAM WALTER, RICHARD WILLIAM LARSON, ARTHUR RANDALL SANDERS, JR., MICHAEL JOHN GRASSI, JR., and others, would and did establish, acquire, operate, and control, Gulf Coast News Agency, Inc., TWA, Inc., SSW, Inc., Fun & Games, Inc., and BAST, Inc., for the purpose of selling and distributing certain obscene, lewd, lascivious, and filthy books, pictures, and motion pictures.

In furtherance of the conspiracy and to effect the objects thereof, the defendants did commit the following overt acts:

1. On or about April 6, 1973, ARTHUR RANDALL SANDERS, JR., signed as president, an application for Certificate of Registration with the Florida Department of Revenue for the Kennedy Book Mart, 2928

West Kennedy Boulevard, Tampa, Florida. Said store is owned and operated by SSW, Inc., a Georgia corporation.

2. That on or about May 24, 1974, ARTHUR RANDALL SANDERS, JR., signed as director, an application for Certificate of Registration with the Florida Department of Revenue for the Tamiami Adult Book Store, 4500 South Tamiami Trail, Sarasota, Florida. Said store is owned and operated by TWA, Inc., a Georgia corporation.

3. That on or about May 6, 1974, TWA, Inc. purchased a Lincoln Continental and WILLIAM WALTER signed the sales contract as buyer.

4. On or about June 1, 1975, RICHARD WILLIAM LARSON signed a lease for office and warehouse facilities at 5430 70th Avenue North, Pinellas Park, Florida, on behalf of Gulf Coast News Agency, Inc.

5. On or about July 25, 1975, RICHARD

WILLIAM LARSON signed a county occupational license in Pinellas County, Florida, on behalf of Gulf Coast News Agency, Inc., 5430 70th Avenue North, Pinellas Park, Florida.

6. On or about July 8, 1975, ARTHUR RANDALL SANDERS, JR., visited the Gulf Coast News Agency warehouse in Pinellas Park, Florida.

7. On or about September 25, 1975, Gulf Coast News Agency, Inc., using alias of D and L Distributors, shipped via Greyhound Package Express, twelve cartons of film to TWA, Inc., using alias of Leggs, Inc.

8. On or about October 15, 1975, MICHAEL JOHN GRASSI, JR., telephoned L'Eggs, Inc., 3176 Marian Drive, Chamblee, Georgia, stating that twelve packages consigned to his company had been mistakenly picked up by L'Eggs, Inc., in the Greyhound Bus Terminal.

9. On or about November 23, 1975, WILLIAM WALTER visited the Gulf Coast News

Agency warehouse in Pinellas Park, Florida.

COUNT TWO

That, on or about the 25th day of September, 1975, GULF COAST NEWS AGENCY, INC., WILLIAM WALTER, RICHARD WILLIAM LARSON, MICHAEL JOHN GRASSI, JR., and ARTHUR RANDALL SANDERS, JR., aided and abetted by each other and others unknown to the grand jury at this time, did knowingly transport and cause to be transported in interstate commerce from St. Petersburg, Florida, in the Middle District of Florida, to Atlanta, Georgia, for the purpose of sale and distribution obscene, lewd, lascivious, and filthy films, that is, David's Boys, No. 13, "Look At The Birdie", in violation of Title 18, United States Code, Sections 1465, and 2.

COUNT THREE

That, on or about the 25th day of September, 1975, GULF COAST NEWS AGENCY, INC., WILLIAM WALTER, RICHARD WILLIAM

LARSON, MICHAEL JOHN GRASSI, JR., and ARTHUR RANDALL SANDERS, JR. aided and abetted by each other and others unknown to the grand jury at this time, did knowingly use and cause to be used a common carrier for carriage in interstate commerce from St. Petersburg, Florida, in the Middle District of Florida, to Atlanta, Georgia, an obscene, lewd, lascivious, and filthy film, that is, David's Boys, No. 13, "Look At The Birdie", in violation of Title 18, United States Code, Sections 1462, and 2.

COUNT FOUR

That, on or about the 25th day of September, 1975, GULF COAST NEWS AGENCY, INC., WILLIAM WALTER, RICHARD WILLIAM LARSON, MICHAEL JOHN GRASSI, JR., and ARTHUR RANDALL SANDERS, JR. aided and abetted by each other and others unknown to the grand jury at this time, did knowingly transport and cause to be transported in interstate commerce from St.

Petersburg, Florida, in the Middle District of Florida, to Atlanta, Georgia, for the purpose of sale and distribution obscene, lewd, lascivious, and filthy films, that is, David's Boys, No. 2, "The Clean Up", in violation of Title 18, United States Code, Sections 1465, and 2.

COUNT FIVE

That, on or about the 25th day of September, 1975, GULF COAST NEWS AGENCY, INC., WILLIAM WALTER, RICHARD WILLIAM LARSON, MICHAEL JOHN GRASSI, JR., and ARTHUR RANDALL SANDERS, JR. aided and abetted by each other and others unknown to the grand jury at this time, did knowingly use and cause to be used a common carrier for carriage in interstate commerce from St. Petersburg, Florida, in the Middle District of Florida, to Atlanta, Georgia, an obscene, lewd, lascivious, and filthy film, that is, David's Boys, No. 2, "The Clean Up", in

violation of Title 18, United States Code, Sections 1465, and 2.

COUNT SIX

That, on or about the 25th day of September, 1975, GULF COAST NEWS AGENCY, INC., WILLIAM WALTER, RICHARD WILLIAM LARSON, MICHAEL JOHN GRASSI, JR., and ARTHUR RANDALL SANDERS, JR. aided and abetted by each other and others unknown to the grand jury at this time, did knowingly transport and cause to be transported in interstate commerce from St. Petersburg, Florida, in the Middle District of Florida, to Atlanta, Georgia, for the purpose of sale and distribution obscene, lewd, lascivious, and filthy films, that is, David's Boys, No. 4, "Black Rape", in violation of Title 18, United States Code, Sections 1465, and 2.

COUNT SEVEN

That, on or about the 25th day of September, 1975, GULF COAST NEWS AGENCY,

INC., WILLIAM WALTER, RICHARD WILLIAM LARSON, MICHAEL JOHN GRASSI, JR., and ARTHUR RANDALL SANDERS, JR. aided and abetted by each other and others unknown to the grand jury at this time, did knowingly use and cause to be used a common carrier for carriage in interstate commerce from St. Petersburg, Florida, in the Middle District of Florida, to Atlanta, Georgia, an obscene, lewd, lascivious, and filthy film, that is, David's Boys, No. 4, "Black Rape", in violation of Title 18, United States Code, Sections 1462, and 2.

COUNT EIGHT

That, on or about the 25th day of September, 1975, GULF COAST NEWS AGENCY, INC., WILLIAM WALTER, RICHARD WILLIAM LARSON, MICHAEL JOHN GRASSI, JR., and ARTHUR RANDALL SANDERS, JR. aided and abetted by each other and others unknown to the grand jury at this time, did

knowingly transport and cause to be transported in interstate commerce from St. Petersburg, Florida, in the Middle District of Florida, to Atlanta, Georgia, for the purpose of sale and distribution obscene, lewd, lascivious, and filthy films, that is, David's Boys, No. 14, "The Massage", in violation of Title 18, United States Code, Sections 1465, and 2.

COUNT NINE

That, on or about the 25th day of September, 1975, GULF COAST NEWS AGENCY, INC., WILLIAM WALTER, RICHARD WILLIAM LARSON, MICHAEL JOHN GRASSI, JR., and ARTHUR RANDALL SANDERS, JR. aided and abetted by each other and others unknown to the grand jury at this time, did knowingly use and cause to be used a common carrier for carriage in interstate commerce from St. Petersburg, Florida, in the Middle District of Florida, to Atlanta, Georgia, an obscene, lewd, las-

civious, and filthy film, that is, David's Boys, No. 14, "The Massage", in violation of Title 18, United States Code, Sections 1465, and 2.

COUNT TEN

That, on or about the 25th day of September, 1975, GULF COAST NEWS AGENCY, INC., WILLIAM WALTER, RICHARD WILLIAM LARSON, MICHAEL JOHN GRASSI, JR., and ARTHUR RANDALL SANDERS, JR. aided and abetted by each other and others unknown to the grand jury at this time, did knowingly transport and cause to be transported in interstate commerce from St. Petersburg, Florida, in the Middle District of Florida, to Atlanta, Georgia, for the purpose of sale and distribution obscene, lewd, lascivious and filthy films, that is, Dav's Boys, No. 17, "Loving Hands", in violation of Title 18, United States Code, Sections 1465, and 2.

COUNT ELEVEN

That, on or about the 25th day of September, 1975, GULF COAST NEWS AGENCY, INC., WILLIAM WALTER, RICHARD WILLIAM LARSON, MICHAEL JOHN GRASSI, JR., and ARTHUR RANDALL SANDERS, JR. aided and abetted by each other and others unknown to the grand jury at this time, did knowingly use and cause to be used a common carrier for carriage in interstate commerce from St. Petersburg, Florida, in the Middle District of Florida, to Atlanta, Georgia, an obscene, lewd, lascivious, and filthy film, that is, David's Boys, No. 17, "Loving Hands", in violation of Title 18, United States Code, Sections 1465, and 2.

A TRUE BILL

FOREMAN

JOHN L. BRIGGS
UNITED STATES ATTORNEY

By: /s/ Anthony J. LaSpada
ANTHONY J. LaSPADA
Assistant United States Attorney

I certify the foregoing to be a true and correct copy of the original.

Wesley R. Thies, Clerk
United States District Court
Middle District of Florida

By: /s/ Robert J. Muir
Deputy Clerk

mean?

MR. MAYOCK: Yes. That's on the motion to suppress.

THE COURT: Yes, I understand that position.

(Recess, 2:12 p.m. - 2:55 p.m.)

THE COURT: In addition to the pure motion to suppress or the traditional motion to suppress which the Court is considering in this case and has had before it for consideration throughout the course of this hearing, there is also, as last discussed with counsel, a motion made by the Defendants for the return of the property, which in the context of this case creates, in my view, an additional issue, and that is whether, even assuming the seizure of the property -- if, in fact, there was a seizure by the Government -- was proper to hold for evidentiary purposes, the Defendants might nevertheless be entitled to the return of

the property to the extent that the Government does not require it for legitimate or reasonably necessary evidentiary purposes, the property not being so far, as has been shown to the Court, contraband per se.

Now, at any other stage of this proceeding, or perhaps in another case with a different procedural posture than this one, it would be my view, on the basis of the limited research and consideration that I have been able to give to this matter, that the Defendants' position would be well taken, at least in part, and that the Court would be obliged to conduct a hearing to determine, first of all, whether or not the material is or whether probable cause exists to believe that the material may be obscene as a matter of law, and if so, whether or not the Government is in possession of material beyond that which it would need for evidentiary purposes at trial, whether the nature of the material is such that the re-

tention of possession by the Government might effectively suppress its dissemination or disclosure by the Defendants, based upon the particular type of material involved, and so on.

In this particular instance, however -- and especially since we're on the virtual eve of trial, literally -- it seems to me that the answer is supplied by the decision in Heller, itself.

At this point of the case there is no suggestion that an order or other form of final restraint is about to be imposed with respect to the material. This is to say, it's not threatened with destruction.

It's being preserved merely as evidence, and there has been no showing that seizure of these copies of the films involved have precluded exhibition of other copies of the films which one might assume, as the Court did in Heller, are available.

And inasmuch as the case is scheduled

for trial commencing no later than tomorrow morning, looking toward an imminent determination of the questions of obscenity as well as violation of the law, both by the Court and -- if not by the Court -- by the Jury, then it seems to me, as in Heller, consideration of the motion to return the property as such can await determination of those central issues at the conclusion of the trial by jury, which, as I just stated, is scheduled to begin no later than tomorrow morning.

Insofar as the motion to suppress is concerned, as I have already stated, I regard the pending motion as a very close and important and serious motion, both factually and legally.

Having heard the testimony and evidence adduced by the parties, I generally find the following facts relevant to a determination of the motion to suppress:

On or about September 25, 1975, someone

other than the moving Defendants, but a person who was acting at their explicit request, delivered into the possession of the Greyhound Bus Company in St. Petersburg twelve boxes or packages for transportation to and delivery in Atlanta, Georgia.

The Greyhound express agent on that occasion made out the delivery slips which have been received -- copies of which have been received in evidence for purposes of this proceeding as Government's Exhibit Number 1, indicating that the shipper was D & L Distributing, or D-i-s-t, at an address or addresses in Pinellas Park or St. Petersburg, Florida, and the consignee with respect to each of these boxes or items was described as Leggs, Incorporated, Atlanta, Georgia.

The boxes were transported by Greyhound to Atlanta.

When they arrived in Atlanta, they were diverted to a sub-station of the Greyhound

Bus Company in DeKalb County, Georgia, where in accordance with the usual custom of Greyhound insofar as regular customers were concerned, the agent at the DeKalb station called the local representative of a known customer, namely, L'Eggs, Incorporated, or L'Eggs Products, Incorporated, to notify that Company that packages had arrived which the agent presumed or assumed were intended for that particular customer or consignee.

As a consequence of that information received over the telephone, Mr. Horton, one of the witnesses, who was an employee of L'Eggs Products, Incorporated, in Chamblee, Georgia, drove in his automobile, as it was customary for him and other employees of that office to do, to the Greyhound sub-station where he observed these twelve packages.

He testified that when he saw the packages, they looked strange to him and

were not the type normally received in the regular course of business of his employer.

He therefore opened one of the packages and saw what he described as a film box which displayed on one side of the box certain narrative descriptions purportedly representing the content of the film enclosed as the contents of the box.

He further testified, based upon what he saw at that time, that he personally reached the conclusion that the boxes contained in his words, quote, "homosexual pornographic film," close quote.

Having reached that opinion or conclusion, he left the packages or boxes at the Greyhound substation and returned to his office or place of employment, and told his co-workers and superiors, namely, Mr. Fox and Mr. Shults, what he had observed.

At that point, Mr. Fox, being concerned -- according to his testimony, which I credit -- that his employer, namely, L'Eggs Products,

Incorporated, might become -- again, in his words -- "implicated in some way," he drove to the freight station and obtained the twelve boxes from the agent, the Greyhound agent, at that location, and returned with those boxes containing, of course, the items, which are the subject of the motion before the Court, to the office of L'Eggs Products, Incorporated, where it appears -- and I find -- that employees of L'Eggs, Incorporated, including Mr. Horton, Mr. Fox, and Mr. Shults, among others, opened the packages and examined all of the contents, to the extent of inspecting the various boxes apparently containing reels of -- individual reels of 8-millimeter film. And Mr. Shults, at least, went to the extent of opening one of two of the boxes and holding the film up to the light in an unsuccessful effort to determine whether the scenes depicted on the film would be discernible to the naked eye. -- I say "unsuccessful," because, as he

testified, the film was too small to be able to ascertain from a naked eye examination what the frames of the film depicted.

Each of the witnesses also testified, however, that they reached the conclusion subjectively, from the narrative description material printed on the boxes concerning the several films, that the films did relate to what they referred to as "homosexual pornographic material."

Because of those subjective conclusions, Mr. Horton at the suggestion, I believe -- or, at least, the acquiescence and concurrence -- of Mr. Fox and Mr. Shultz -- telephoned his wife, who coincidentally at that time was employed as a clerical employee by the Atlanta office of the Federal Bureau of Investigation, and at that time spoke on the telephone to Agent Mandyck who happened to be in the FBI office at the time the telephone call was made.

The purpose of making the telephone

call, according to the testimony of Mr. Horton as well as that of Mr. Fox, and especially Mr. Shults, was to make a determination from their point of view as to whether or not this material or possession of it was illegal, and if so, whether or not the FBI would come and take possession of it.

With respect to that I find, based upon the testimony of all the witnesses, including that of Agent Mandyck, that Mr. Horton was told by Agent Mandyck that the material, based upon his description, might be or probably was unlawful to possess, or that there had been a violation of it had been transported in interstate commerce. And in response to the request of Mr. Horton and his colleagues that the FBI take possession of the material, Agent Mandyck told Mr. Horton to put it aside where, in Mr. Horton's words, "it won't be bothered," and the FBI would come and pick it up, which, of course,

occurred approximately five days later, according to the testimony of Agent Mandyck, which I credit on that point.

He, in the company apparently of Agent Prekopio, visited the business premises of L'Eggs Products, Incorporated, some four or five days subsequent to the initial telephone communication, at which time the two FBI Agents took in their possession the entire twelve boxes or cartons of smaller boxes of individual reels of film -- all of the materials that are now the subject of the motion -- which the FBI has retained in its possession continuously since that time.

And thereafter, according to the testimony of Agent Mandyck which I also credit on the point, he has viewed representative reels of each of the separate films contained within these cartons in order to prepare narrative summaries of the contents of each film.

At no point in time, even up until today, has any representative of the Government either applied for or obtained any warrant with respect to the Government's possession of these materials to either search or seize such materials.

On the other hand -- to go back for a moment -- I also find that at no time in the factual circumstances which I have recited, insofar as the activities of either Mr. Horton, Mr. Fox or Mr. Shults are concerned -- that is to say, employees of L'Eggs Products, Incorporated -- did any of those gentlemen act either actually or constructively as agents or tools of the Government or FBI in opening, examining, or otherwise dealing with the material in question.

Rather, they acted of their own volition in everything that they did, including the delivery or transfer of the possession of the material, itself, to the FBI.

In the words of Mr. Shults, "We asked

the FBI to pick up the film," quote, unquote.

It is true, of course -- and I so find, though I do not deem it to be germane to the question of the legality of the taking of the film by the FBI -- that Agent Mandyck did instruct representatives of L'Eggs Products, Incorporated, as well as representatives of Greyhound, to attempt to determine the identity of any person or persons who might telephone or otherwise call for or make inquiry about the material after its existence had been called to the attention of the FBI, but that that was the extent of the request made or instruction given by FBI agents to any of the private persons involved, to the extent disclosed by the evidence -- credible evidence in the record before me.

I further find with respect to the lack of a warrant, as already mentioned, that neither was there any formal motion or request made by any third party or either of the moving Defendants for either an adversary

hearing or return of the property prior to the instant motion which the Court is in the process of considering and deciding.

Now, with respect to the legal issues in the matter and my conclusions of law, the first legal issue to be resolved, as I see it, and as urged by the parties, is the issue of the Defendants' standing to urge the motion to suppress.

That general issue, as I perceive it, is made up of two component issues.

The first is whether or not the Defendants have shown sufficient proprietary or possessory interest in the material to be heard -- to urge a motion to suppress.

On that point I conclude that as to that aspect of standing, the Defendants do have standing to assert the motion, based upon the decisions in Jones, Simmons, in the Supreme Court, and Kelley in the Eight Circuit, the authorities cited by counsel in the legal memoranda in the case.

To hold otherwise would permit the

Government to take essentially inconsistent positions, in my view, in this case.

It is alleged in the substantive count, as distinguished from the conspiracy count of the Indictment, that each of the moving Defendants either transported or caused to be transported the subject materials in interstate commerce. And one of the essential elements of that charge, it seems to me, is to show -- even though possession per se is not an element of the offense -- in effect, constructive possession is, in order to show that the Defendants caused that transportation to occur, as stated in Kelley.

And while, as I shall state in a few moments, I do not believe that the Eighth Circuit decision in Kelley is the best available authority on all of the points that I have to decide, I believe that it is correct with respect to the standing issue insofar as proprietary and possessory interests are concerned, and that the Defendants do have standing in that respect.

Whether, however, the Defendants had under the circumstances of this case -- or retained and maintained -- a reasonable expectation of privacy in the material involved, which is the other aspect of the standing issue, it is my conclusion that they did not.

The evidence shows -- and I should have found as a fact, and do now find as a fact -- that both the name and address of the alleged shipper as supplied to the Greyhound freight agent in St. Petersburg at the time and place the items were shipped, as well as the name of the consignee in Atlanta -- namely, Leggs, Inc. -- were fictitious names, and in the instance of the shipper the address as well.

And it seems to me, under the circumstances of this case, that shipping or causing or suffering to be shipped by a common carrier, namely, Greyhound Bus Lines, with a fictitious name given for the shipper as well as the fictitious name given for the

consignee or addressee, amounts to a relinquishment or abandonment of any reasonable expectation of privacy.

Or, stated another way, it seems to me that it was reasonably foreseeable in those circumstances that what actually occurred would occur. That is to say, that there was substantial likelihood that the material would be mis-delivered and fall into the hands of some third party, as actually happened in this case, where it would be opened and its privacy, if it had any, invaded.

Now, there are two things I would add to that.

The first is that the explanation suggested, that the selection of a fictitious name for the shipment of such materials serves the legitimate object of avoiding what would otherwise be an open invitation to pilferage or the like, and therefore should not be found to be a relinquishment or abandonment of a reasonable expectation of privacy, is simply non sequitur.

While it may be true that the use of the real name of the consignee in some situations for whom material of this type would be intended would, in effect, disclose its contents and therefore invite pilferage by those would have its temporary custody along the way, may be a legitimate fear, the selection of a fictitious name for the consignee is not necessary or, in my view, even a reasonable response.

A more reasonable method, it would seem to me, of avoiding that undesirable effect would be to use the true name or surname of an individual rather than some fictitious name, which, as I say again, has a higher capacity or likelihood for resulting in precisely what resulted in this case, namely, exposure of the material to the inquiring eyes of innocent third parties.

And I believe as I have stated, and would conclude -- though I would acknowledge that the law is unclear at best with respect to it -- that those sequence -- those

events, rather, in that sequence would constitute a relinquishment of any expectation of privacy.

One other comment I would make with respect to that.

Mr. Zell suggested in his argument that to find that those circumstances would result in an abandonment or relinquishment in law of a reasonable expectation of privacy cannot be squared with the factual situation, for example, in *Road vs. Kentucky*, which involved a public showing of a film, but not in the process a relinquishment of the right of expectancy of privacy in the film, itself.

I think the distinction lies in what constitutes the property in which privacy is expected. It is not the content of the film, but the film, itself, as to which there was no relinquishment of the proprietor's expectancy of privacy or retained possession and control in *Roaden*, which is the distinguishing point, I think, between that decision and this one.

Here the film or the negative, itself, was let out of the possession of those having proprietary or possessory interest, delivered into the hands of a common carrier, addressed to a fictitious addressee -- but one which as it turns out, generically at least, actually existed -- resulting in innocent third party discovery.

The other issues -- legal issues presented by the motion would involve the question of whether or not, first, there was a private or a Governmental search.

The most pertinent authorities on that issue, I believe, that have been cited to the Court are the *Sherwin* case, the en banc decision in the Ninth Circuit; the *Haes* case, *H-a-e-s*, in the Eighth Circuit; the *Entringer* case in the Eighth Circuit; and also the *Kelley* case in the Eighth Circuit.

I think it is correct that the *Haes* case comes closest to supporting the moving Defendants' position with respect to that issue than any of the others.

The distinguishing feature I think in this case, however, is that here as in Entringer there was sufficient descriptive material accompanying the film, itself, to enable the private persons who were examining the material to form a subjective conclusion that the material was probably pornographic.

I would hasten to add, however, that I am inclined personally to agree with Judge Webster, who dissented in the Haes case, that a subjective private determination should never be made the touchstone upon which Fourth Amendment rights are made to depend.

Rather, I think the decision in Sherwin, which rejects Kelley and, implicitly, Haes on that point, is the better reasoned authority.

There was simply no Governmental involvement in the initial search, if you will, of these packages, and review of their contents. That was all carried out by representatives of L'Eggs Products, Incorporated,

as I have already found as a fact, and was not tainted in any way by Governmental instigation or involvement.

It was a private search, under the authorities -- even Haes, for that matter -- not subject to Fourth Amendment constraints.

The closer and, I think, ultimately more important issue in the case is whether or not there was -- if not a Government search -- nevertheless, a Government seizure. And this, of course, is the importance of the recent Ninth Circuit en banc decision in United States v. Sherwin.

Now, as pointed out during argument, there was in Sherwin a warrant obtained -- however, only after the Government had come into possession of two copies of certain books. And that initial aspect of the case, in my view, is factually indistinguishable from the circumstances presented in this case.

And the Court determined -- and I repeat that I was an en banc decision -- that there was no seizure in Fourth Amendment parlance

involved in the case, because of the consensual transfer of the material by the private searcher to the Government. And I believe that that is a persuasive opinion by virtue of the closeness to this case, and until the Fifth Circuit holds otherwise, it is entitled to be followed and applied.

So, in summary, based upon the facts as I have found them, my legal conclusion is that the motion to suppress should be denied because of a lack of reasonable expectation of privacy on the part of the moving Defendants in the materials in question, and alternatively, in any event, that there was a private search and no Government seizure within the meaning of the Fourth Amendment, in any event, based upon, principally, the decision in *United States v. Sherwin*, 539 Federal 2d, Page 1, decided en banc in the Ninth Circuit last year.

And I will summarize by way of repetition what I stated at the outset with respect to the Defendants' motion for return of the

property over and above or beyond that legitimately required by the Government for evidentiary purposes in this case, and/or for a prior evidentiary hearing or adversary hearing incident to a determination as to what the ultimate disposition of the material may be. I, in effect, reserve ruling on that motion pending the evidence to be taken at trial, which is due to commence tomorrow morning, in all events. And that will be the Order of the Court with respect to the pending motion.

Is there anything else that needs to be taken up in this case this afternoon?

MR. MAYOCK: Yes, Your Honor, there is. I have a number of things I would like to bring to

MR. LUND: Your Honor, I would submit the jurors -- if they haven't seen the evidence, it's going to be in evidence in the deliberation.

THE COURT: Well, I understand.

I made it a point to observe the jury from time to time during the publication of each of these exhibits. It seems to me that the jury is paying strict attention with the possible exception of Mr. Kohring and Mrs. Silver, who is not one of the jurors named by Mr. Mayock.

MR. MAYOCK: I couldn't see her.

THE COURT: On the other hand, it seems to me that, at least, I would say seven out of the ten times that I have observed or may have observed the jury, that those jurors were viewing the films, and they were noticed by me to have averted their eyes on two occasions.


But I don't think the situation is one of such inattentiveness as requires inter-

vention by me at this time.

And then, as Mr. Lund points out, the exhibits will be available for the jury's further view during deliberations, if they request to do so.

MR. MAYOCK: Fine, Your Honor.

Can the record reflect at this point in time



obscene or not, and would request at this time that he be excused.

And I think the Court probably was aware of the fact that he wasn't viewing the films either.

THE COURT: Well, I observed the jury, Mr. Mayock, and made it a point to do so from time to time on numerous occasions during the publication of the exhibits. And I would simply restate what I had to say at Sidebar at this particular time.

I do not believe that any individual juror was so inattentive during publication as to require excusal.

The record will reflect the motion and request.

And we'll take a fifteen minute recess.

(Recess, 3:04 p.m. to 3:18 p.m.)

(Jury not present following recess)

THE COURT: Are you ready to proceed with your witness, Mr. Mayock?

MR. MAYOCK: I am, Your Honor.

THE COURT: Seat the jury, Marshal.

I will of course, announce to the jury that the witness is being called out of turn

(Jury recalled and present)

THE COURT: Thank you. Be seated, ladies and gentlemen.

in those matters in which it might still be available?

MR. HALL: I have give him advice on that point, Your Honor.

THE COURT: Pardon me?

MR. HALL: I have given him advice on that, Your Honor.

THE COURT: And what was the advice -- to assert it or not to assert it?

MR. HALL: To assert it when appropriate.

THE COURT: All right. Thank you, Mr. Hall.

Do you have any further statement you wish to make to the Court with respect to that, then, Mr. Mayock?

MR. MAYOCK: No, Your Honor. I'll submit the matter.

THE COURT: Well, it seems to me that while, obviously, the circumstances are not precisely the same, inasmuch as Mr. Grassi is not a Defendant on trial, that,

nevertheless, the circumstances are substantially the same in principle with those normally presented when a severance is sought by a defendant who seeks to call a co-defendant -- who is on trial -- as a defense witness. So that, it seems to me, the principles of the Fifth Circuit decisions in that area. namely, United States -- I believe these are some of the decisions -- United States vs. Byrd, United States vs. Cochran, United States vs. Diaz, principally, would apply. And given the assertion of the privileges which the witness would intend to assert, and the lack of a showing of exculpatory testimony --

MR. MAYOCK: Your Honor, can I make a proffer as far as exculpatory testimony?

THE COURT: Well, that's why I asked you if you had anything else to say to the Court, Mr. Mayock.

MR. MAYOCK: Fine, Your Honor. I think it's very important. --

MR. LUND: Your Honor, before a proffer is made, we would request that Mr. Grassi leave the Courtroom.

THE COURT: Very well. I think that may be a proper request.

You may withdraw, Mr. Grassi.

(Witness retires from Courtroom.)

THE COURT: Go ahead, Mr. Mayock.

MR. MAYOCK: Thank you, Your Honor.

I think it's apparent that what Mr Grassi can testify to is that Mr. Walter was the owner of other corporations, such as Ashley Art, Gay Paree, Classic Art Corporation, and that those were the basic enterprises in which Mr. Walter was engaged, and not the ones named -- the particular corporations named in any way in the first count of the Indictment or as Defendants in this case.

And, moreover, I believe Mr. Grassi can testify to the fact that Mr. Walter had never seen the films in question.

That's entirely consistent with the testimony he gave during the course of the motion to suppress, that he didn't know anything about the nature, contents and character of these films.

And accordingly, that would definitely go to the knowledge element which the Government has to prove beyond a reasonable doubt, and I think Mr. Walter's case would be severely and irreparably prejudiced if he weren't allowed to elicit this information from this witness.

THE COURT: All right. The record will show that proffer. And I am still of the view that the requirements of the decisions I mentioned have not been met, and I would preclude in this case the Defendant from calling the witness Grassi.

The record will so reflect.

MR. MAYOCK: Your Honor, could I inquire about those decisions? Do those involve co-defendants who have not entered

pleas?

THE COURT: I believe they involve both,

What evidence is there in the record to sustain the allegations of Overt Act Number 3 of Count One, the conspiracy Count, Mr. Lund?

MR. LUND: Your Honor, there is no evidence of that.

THE COURT: All right. I'll strike Overt Act Number 3 of Count One at the present time.

But I will otherwise deny the motion for judgment of acquittal, as well as the other motions made and renewed by counsel in behalf of each of the Defendants.

Do you gentlemen have other witnesses that you wish to call as defense witnesses in the case?

MR. MAYOCK: Yes, Your Honor.

THE COURT: All right. You'll be ready to proceed with those at 1:30, Mr. Mayock?

MR. MAYOCK: I'll be ready at 1:30, Your Honor, to proceed with one witness.

What I am trying to do -- not knowing exactly when the prosecution would rest in this matter -- is to try to schedule witnesses to appear at as close a point in time to this as possible. During the Noon hour I will attempt to have somebody confirm the fact that they are flying from Los Angeles here.

THE COURT: All right.

Finally, they ended up telling him, "Well, the stock issue was issued in blank."

Mr. Boshell kept pushing and telling him he needed that information for the tax return file. And then the letter was written by Mr. Zell setting forth Carol Maxey and Michael Grassi and Woodruff and Mr. Akins as the hundred per cent stockholders.

That's powerful circumstantial evidence, Your Honor, as to consciousness of guilt, if you will -- as to knowledge, on the other hand -- that they knew that they were violating the law. They knew that the materials that were being shipped in interstate commerce were obscene materials.

One additional piece of circumstantial evidence is the fact that the shipment in question here was addressed to the name of "Leggs", a fictitious name. And the reason Mr. Bowman gave for that particular

address was because, if the shipment was misdirected or confiscated in any way, it wouldn't be directed or it wouldn't be linked to Gulf Coast News or TWA warehouse.

That's additional powerful, I believe, circumstantial evidence of guilt and circumstantial evidence of knowledge on behalf of Mr. Walter.

THE COURT: All right. It seems to me the Government's case may be something less than overwhelming with respect to that element of the substantive offenses insofar as the Defendant Walter is concerned. But based upon the argument of counsel concerning circumstantial reliance -- reliance upon circumstantial evidence, and the theory of agency or aiding and abetting, it seems to me the case is sufficient to go to the Jury, and I will deny motion for judgment of acquittal under Rule 29, as well as the other motions made and renewed by defense counsel, and submit the case to the Jury

at this point.

Now, counsel have previously been given a complete set of tentative jury instructions that I had earlier prepared with reference to this case.

I have here, first of all, two additional pages and one substitute page.

Mr. Gay, give each lawyer one copy of these three pages, please. (Handing)

MR. MAYOCK: Your Honor, during the evening I had occasion, in conjunction with Dr. Cline's testimony, to then put two additional instructions which I would like to proffer at this time.

Inasmuch as I only have the original --

THE COURT: Excuse me, Mr. Mayock.

Mr. Gay, I don't believe you can pass them out that way. Those pages were clipped together. They are multiple copies of the same page. Give each lawyer one copy of each set, will you?

MR. MAYOCK: Your Honor, if it would

help counsel, I could read these, so that -- because I only have this one copy -- they would know exactly what I am talking about.

THE COURT: All right. Go ahead, Mr. Mayock.

MR. MAYOCK: I would propose this as Defendant's Number 55, as follows:

There has been some testimony regarding the potential for harm that certain materials in question may have upon a susceptible individual. You are instructed that the question of harm -- if, indeed, you should find it to exist -- bears only upon the third prong of the obscenity test, that is, whether the films in question are utterly without redeeming social importance.

"You are further instructed that films may have social importance and, yet, at the same time have a potential for harm. The two are not inconsistent.

"Remember, at all times the burden is upon the prosecution to prove the films in question to be utterly without redeeming social value. If after deliberating you conclude that a film has a potential for

intended for sale or distribution, but such presumption is rebuttable.

One of the essential elements the Government must prove is the element of scienter or knowledge; that is, that the defendant knew the general nature of the contents of the articles which were transported in interstate commerce. The Government does not have the obligation of showing that the defendant knew that such articles were in fact legally obscene.

Therefore, if you find beyond a reasonable doubt that the defendant transported in interstate commerce the articles in question, and that he knew the general nature of the articles, that is, he knew what they actually were, and if you find beyond a reasonable doubt that the articles were in fact "obscene" within the meaning of these instructions, then you may find that the defendant had the requisite knowledge, or scienter as we

call it in the law.

Freedom of expression is fundamental to our system, and has contributed much to the development and well-being of our free society. In the exercise of a Constitutional right to free expression which all of us enjoy, sex may be portrayed and the subject of sex may be discussed, freely, and publicly.

Material is not to be condemned merely because it contains passages or sequences that are descriptive of sexual activity. However, the Constitutional right to free expression does not extend to that which is "obscene."

"Obscene" means something which deals with sex in such a manner that the predominant appeal of the material, viewed in its entirety, is to the prurient interest of the average person of the community as a whole, or the prurient interest of a deviant sexual group, as the case might be, and is so patently offensive that it is

utterly without redeeming social value.

An appeal to prurient interest is an appeal to a morbid, degrading and unhealthy interest in sex, as distinguished from a mere candid interest in sex.

The first test to be applied, therefore, in determining whether given material is obscene, is whether the predominant theme or purpose of the material, when viewed as a whole and not part by part, and when considered in relation to the intended and probable recipients, is an appeal to the prurient interest of the average person of the community as a whole, or the prurient interest of members of a deviant sexual group, as the case might be.

The "predominant theme or purpose of the material, when viewed as a whole," means the main or principal thrust of the material when assessed in its entirety and on the basis of its total effect, and not on the basis of incidental scenes or

isolated passages or sequences.

Whether the predominant theme or purpose of the material is an appeal to the prurient interest of the "average person of the community as a whole" is a judgment which must be made in light of contemporary standards as would be applied by the average person with an average and normal attitude toward, and interest in, sex.

Contemporary community standards, in turn, are set by what is accepted in the community as a whole; that is to say, by society at large or people in general. So, obscenity is not a matter of individual taste and the question is not how the material impresses an individual juror; rather, as stated before, the test is how the average person of the community as a whole would view the material.

In addition to considering the average or normal person, the prurient appeal requirement may also be assessed in terms

of the sexual interest of a clearly defined deviant sexual group if you find, beyond a reasonable doubt, that the material was intended to appeal to the prurient interest of such a group as, for example, homosexuals.

An appeal to prurient interest, as stated before, is an appeal to a morbid, degrading and unhealthy interest in sex as distinguished from a candid interest in sex.

The second test to be applied in determining whether given material is obscene is whether it depicts or describes, in a patently offensive way, sexual conduct such as ultimate sexual acts, normal or perverted, actual or simulated; masturbation, excretory functions; or lewd exhibition of the genitals.

In making that judgment, however, you must not condemn by your own standards, if you believe them to be stricter than those

generally held; and you must not excuse by your own standards, if you believe them to be tolerant than those generally held. Rather, yo must measure whether the material is patently offensive by contemporary community standards; that is, whether it so exceeds the generally accepted limits of candor as to be clearly offensive.

Contemporary community standards are those established by what is generally accepted in the community as a whole; that is to say, by society at large or people in general; and not by what some groups of persons may

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WILLIAM WALTER

UNITED STATES DISTRICT COURT

MIDDLE DISTRICT OF FLORIDA

TAMPA DIVISION

UNITED STATES OF AMERICA,

Plaintiff,

v.

WILLIAM WALTER, et al.,

Defendants.

No. 77-49-Cr-T-H

DEFENDANTS' REQUESTED VOIR DIRE
EXAMINATIONS

COMES NOW Defendant WILLIAM WALTER who does request that the Honorable Court present the following questions on voir dire examination of the jury in the above entitled and numbered case:

1. How much education have you had?
2. Do you attend church on a regular

basis? If so, how often?

3. If you were required to view a movie in this courtroom with other persons of the opposite sex on this jury, and the film depicted explicit sexual conduct, would you be shocked? If you would be shocked would you be able to overcome your personal feelings and be able to still decide the case, without regard to whatever personal feelings you had, and strictly on the basis of the evidence?

4. Assume that you viewed the films and brochures involved in this case and personally believed them to be obscene according to your own belief, but under the law as given by the Judge you found that said materials were not legally obscene, would you have any hesitancy to acquit the defendant?

5. Are you or any member of the jury, in any way related to any party in this action, either the Court, counsel for the Government, counsel for the Defendant, or any peace officers, marshals, or officers of the United States Government which may or might have been

involved in the gathering of evidence or in the prosecution of this case on behalf of the Government?

6. Are you, or is any member of this jury, a member of a religious organization? As such, do any of you have any personal convictions which would prevent you from fairly and honestly believing in the principle that a defendant charged with an offense of this nature has the right to place the burden upon the Government to prove its case beyond a reasonable doubt?

7. Is there any member of this jury who has ever served in a jury case previous to being on this panel, and if so, without stating the nature of the outcome of that case, will you state the subject matter that was before the court in that case?

8. Have you or any of you read any newspaper or television accounts of this case, and if so, from the accounts you have read, have you formed or expressed any opinion as to the merits of this case?

9. Have you or any of you formed any opinion as to the guilt or innocence of the defendant in this case?

10. Have you or any of you any impression or opinion as to the merits of this case?

11. If you have formed an opinion as to the guilt or innocence of this defendant, would it require evidence to change or remove the opinion you entertain?

12. Knowing what you do about this case and the opinion you have formed of its merits, would you be entirely satisfied to be tried by a jury which holds your present frame of mind if you were the person charged with this offense?

13. If you or any of you are sworn as a juror would you lay aside any opinion you may now have and act solely upon the evidence introduced here and the instruction of the court?

14. Have you or any of you ever been the complaining witness in a criminal case or has any member of your family or close per-

sonal friend been?

15. Could you or any of you give the defendant the same fair trial, considering the nature of the charge against him, as you could if he were charged with any other offense?

16. If the prosecution does not satisfy you, or any of you, by the evidence, beyond a reasonable doubt, of the guilt of the defendant, will you vote for a verdict of not guilty?

17. Do you and each of you understand that under the law the defendant is not required to prove his innocence in this case but that it is the duty of the prosecutor to prove his guilt beyond a reasonable doubt?

18. Would you, and each of you, render a verdict in this case according to the law and the evidence and not allow the fear of criticism from any source to influence your verdict?

19. Would your verdict be based solely on the evidence and instructions on the law

given you by the Court and not be influenced by any other matter or thing?

20. Would you, and each of you, give the defendant the benefit of your reasonable doubt, if you had such doubt, and find the defendant not guilty?

21. Would you, or any of you, allow the fact that a number of jurors were voting differently than you were to influence you to change your verdict for that reason alone?

22. The defendant is presumed to be innocent under the law until he is found guilty. Would you, and each of you, give him the benefit of that presumption in considering the evidence in this case and find him not guilty unless you are satisfied of his guilt beyond a reasonable doubt?

23. If you, or any of you, have a reasonable doubt as to the guilt or innocence of the defendant, will you give him the benefit of the doubt and find him not guilty?

24. Do you, and each of you, understand

that you may believe as men and women that certain facts exist but as jurors you can act only upon the evidence introduced upon the trial of this case and from that and that only you must arrive at your verdict?

25. Do you, and each of you, understand that after consideration of the whole case and all the evidence you should entertain a reasonable doubt of the guilt of the defendant it is your duty not to vote for a verdict of guilty nor to be influenced in such voting by the single reason that a majority of the jurors are in favor of a verdict of guilty?

26. If the evidence relating to any or all the facts in this case in view of all the evidence, is susceptible of two reasonable interpretations, one of which would point to the defendant's guilt and the other would indicate his innocence, then do you understand that it is your duty in considering such evidence to adopt that interpretation which points to the defendant's inno-

cence and reject that which points to his guilt?

27. If you, or any of you, are sworn as a juror in this case could you and would you give the defendant a fair and impartial trial?

28. Do you know the United States Attorney for this District?

29. Do you know anyone employed or connected with, either directly or indirectly, the staff of the United States Attorney for this District, or any District? If the answer to either of the foregoing is in the affirmative, please ask the prospective juror:

(a) How and under what circumstances have you known him or her?

(b) How well do you know him or her?

(c) How long have you known him or her?

30. Where do you live?

31. How long have you lived in the Middle District of Florida?

32. From where do you come to the Middle District of Florida?

33. In what other places have you resided?

34. Are you married?

35. What is the name of your spouse?

36. What grade have you reached in your formal schooling?

37. What schools did you attend?

38. Do you have any children? If the answer to the foregoing is in the affirmative please ask the prospective juror:

(a) Number of children.

(b) Age and sex.

(c) Do they attend public, private or parochial schools.

(d) Specify the schools.

39. Do you live with your spouse and children, if any?

40. What is your occupation?

41. What is the nature of your duties, i.e., what do you do?

42. What is the occupation of the person or persons with whom you live?

43. What is the nature of their duties, i.e., what do they do?

44. What is the nature of your employer's business?

45. If you or your spouse are self-employed, what is the name and nature of the business?

46. Are any of you or your spouses federal employees? If so, state the job and its duties?

47. Would such employment cause you to be influenced in your verdict in favor of the Government?

48. Have you ever been employed by the Federal Government?

49. What was your employment?

50. Under what circumstances did you leave it?

51. Are you seeking employment by the Federal Government?

52. What employment are you seeking?

53. Are any of your relatives or friends employed by the Federal Government?

54. Which ones?

55. What is the nature of their employment?

56. As a result of such employment by your relatives or friends, and in view of the nature of the charge in this case, would you be influenced in your verdict or be embarrassed in any way if you sat as a juror in this case?

57. Are any of your relatives or friends seeking employment by the Federal Government?

58. What employment?

59. Are you related or acquainted with any employee of the Department of Justice, the FBI, the Post Office Department, the Treasury Department or the Customs Bureau? If the answer to the foregoing is in the affirmative, please ask the prospective juror the following:

(a) With whom?

(b) What is his or her position?

(c) How long have you known him or her?

(d) How well do you know him or her?

(e) Would such friendship influence you in your verdict?

60. Are you or is any member of your family or are any of your relatives or friends employed by or associated with any other agency, public or private, which is engaged in any aspect of law enforcement?

61. If the answer to the foregoing is in the affirmative please ask the prospective juror the following?

(a) Who is so employed?

(b) What is his or her position?

(c) What is the name of the agency?

(d) What kind of work does it do?

(e) What kind of work does your friend or relative actually do?

(f) How long have you known him or her?

(g) How well do you know him or her?

(h) Would the relationship of that person to their law enforcement job have any influence on you in your verdict in this case?

62. Have you or any member of your family or any of your friends given information by testimony or otherwise to any committee or any other governmental agency reported to be investigating the circulation of alleged pornography? If the answer to the foregoing is in the affirmative, please ask the prospective juror the following:

(a) Who gave the information?

(b) Was it given voluntarily?

(c) Was it given under subpoena?

(d) How was contact with the committee or agency first established?

(e) Did you or your relative or friend search out the committee or agency, or vice versa?

(f) Would such matters have any influence on your verdict in this case?

63. What was the kind of information given?

64. What did it deal with?

65. Have you ever read any reports or

transcripts of hearings of any state or federal legislative committee investigating the circulation of alleged pornography? If the answer to the foregoing is in the affirmative, please ask the prospective juror the following:

(a) What reports or testimony, have you read?

(b) How did you happen to read such a report of such testimony?

(c) With what person or association did the report or testimony deal?

(d) Would such readings have any influence on you against this defendant in your verdict?

66. Have you ever read any newspaper accounts of the testimony taken before or the reports issued by such aforesaid committee?

67. As a result of reading such newspaper accounts, have you formed an opinion concerning the distribution of pornography?

68. What is that opinion?

69. Have you ever served as a juror before? If the answer to the foregoing is in the affirmative, please ask the prospective juror the following:

(a) Have you served in a civil or criminal case?

(b) On how many cases have you served?

(c) Were any of the attorneys presently prosecuting the case on behalf of the Government attorneys in that or those cases?

70. Have you or any member of your family or relatives or friends ever been a member of, made contributions or, or associated in any way with any of the following organizations?

(a) National Office for Decent Literature?

(b) Legion of Decency?

(c) Citizens for Decent Literature?

71. Do you subscribe or have you ever read any of the books or publications put out by the National Office for Decent Literature, Legion of Decency, or Citizens for Decent Literature? If the answer to the foregoing

is in the affirmative, please ask the prospective juror the following:

(a) Is there anything that has come to your attention as a result of these connections which has caused you to form a preconceived opinion of guilty or innocence in this case?

(b) Is there anything that has come to your attention as a result of these connections which has given you any feelings of dislike or hostility toward this defendant?

72. Has any prospective juror or any of his relatives at any time been a member of, made contributions to, or been associated in any way with any organization of any kind or character which has for one of its principal purposes opposition to the circulation of alleged pornography? If the answer to the foregoing is in the affirmative, please ask the following?

(a) What is the name of the organization?

(b) What was your connection or association with it?

(c) How long were you associated with it?

(d) Did you ever hold office in it?

(e) Would such connection be an influence on you in your verdict in this case?

73. Have you ever expressed your self in writing or otherwise in favor of legislation outlawing or punishing the distribution of allegedly obscene matters and things?

74. Are you in favor of such legislation?

75. Though not an active member in any of the organizations I mentioned, did you or any member of your family attempt to join any organization or association which has as one of its purposes opposition to the distribution of allegedly obscene matters and things. If the answer to the foregoing is in the affirmative, please ask the following:

(a) What is the name of the organization or association?

(b) How was the attempt made?

(c) The reason for not joining?

76. Has any prospective juror or any of its relatives listed your names and addresses with the Post Office, so as not to receive pornography items through the mails at your homes? If so, when did you take such action? Why?

77. Does any prospective juror subscribe to or share the purposes or goals of any organization or association with advocates stricter laws against the distribution of allegedly obscene matters?

78. Whether in school, college, or in private life, has any prospective juror read any book dealing with the subject matter of or describing acts of:

- (a) Prostitution;
- (b) Lesbianism;
- (c) Homosexuality;
- (d) Adultery;
- (e) Rape;

(f) Incest;

(g) Frigidity;

(h) Oral-genital contact;

(i) Impotence;

(j) Sexual intercourse;

(k) Bondage and Discipline (sado-masochism).

80. Have you heard any discussion of the subject of obscenity or censorship in your place of worship? If the answer is in the affirmative, tell us where and when the discussion took place and who the speaker was.

81. Do you feel that your personal predilections, your educational background, and/or your religious beliefs might influence you consciously or unconsciously in attempting to determine whether the books involved in this trial are obscene, and on the guilt or innocence of the accused citizen?

82. Do you have any personal reservations about discussing with the opposite sex

any magazine, newspaper, play or theatrical performance dealing with the aforesaid subjects or describing or depicting sexual matters?

83. If the Court should advise you that the challenged materials must be measured by their impact on the average person and not by their impact on minors or young persons or particularly susceptible persons, would you be willing and able to follow the Court's instruction in that regard?

84. Do you believe that the free speech provisions of the First Amendment to the United States Constitution should protect books and movies even though they may be thought to be tasteless or objectionable to you personally?

85. Do you personally believe there is any value in discussing sexual matters candidly?

86. Have you read any books or seen any films which you think should not be distributed or sold to adults? if the answers is

in the affirmative:

(a) Name the books or films.

(b) Describe subjects deemed offensive, if any.

(c) State the reason for your belief.

87. If the court should advise you that a book or film may not be considered obscene in law unless it goes substantially beyond contemporary community standards in its description or representation of sex, would you be willing and able to follow the court's instruction in that regard?

88. If the court should advise you that a book or film may not be considered obscene in law merely because it depicts the nude body, including the genital area, would you be willing and able to follow the court's instruction in that regard?

89. If the court should advise you that a book or film may not be considered obscene in law merely because the subject matter of the book describes acts of prostitution,

lesbianism, homosexuality, adultery, rape, incest, frigidity, oral-genital contact, impotence, sexual intercourse, or sadomasochism, would you be willing and able to follow the court's instructions in that regard?

90. If the court should advise you that a book or film cannot be deemed obscene if it has any social value, even if the book appeals to prurient interest and goes beyond contemporary community standards, would you be willing and able to follow the court's instructions in that regard?

91. If the court should advise you that the social value of a book or film may not be weighed against its alleged appeal to the prurient interest, that is, if the book has social value then for that reason alone it cannot be deemed obscene, would you be willing and able to follow the court's instruction in that regard?

92. If the court should advise you that

in judging contemporary community standards you must not judge such standards by what you think they ought to be, but what they actually are, that is, what is circulated in the nation in books, magazines, plays, photographs and films with respect to the depiction of sex, sexual activities and nudity, would you be willing and able to follow the court's instruction in that regard?

93. If the court should advise you that a book or film may not be deemed obscene merely because it arouses an erotic or sexual interest, but can only be deemed obscene if it appeals to a shameful or morbid interest in sex, would you be willing and able to follow the court's instructions in that regard?

94. Has any prospective juror read the official report of the Commission on Obscenity and Pornography? If so, do you disagree with the findings by the majority of the report, or do you agree with the findings of the majority of the report?

95. Are any of your close friends, relatives or associates connected in any way with law enforcement or a prosecutorial agency?

96. Other things being equal, would you tend to believe a law enforcement officer more than you would an ordinary citizen?

97. Do you belong to any religious, fraternal, political or social organization which has taken a stand on the issue of obscenity or pornography?

98. Have you ever had occasion to pass or notice an adult theatre or adult bookstore in this community?

99. Did anything about the exterior portion of that theatre/bookstore shock or offend you in any way?

100. Does it disturb or bother you that adults patronize these businesses?

101. Have you seen any of the advertisements of any of these so-called adult theatres? If so, has there been anything about the nature or content of the adver-

tisements of any of these so-called adult theatres that has offended you?

102. Do you feel that the availability in the community of sexually explicit or graphic materials is on the increase or the decrease?

103. Does this fact disturb or offend you?

104. Have you personally ever been exposed or have you known of persons who were exposed to sexually explicit or graphic materials?

105. Have you ever known of anyone to have been harmed or hurt in any way by exposure to sexually explicit or graphic materials?

106. Do you know of any evidence or information that indicates a causal connection between exposure to sexually explicit materials and anti-social behavior_

107. Are you familiar with the use of sexually explicit materials as part of a sex therapy program?

108. Psychologists, psychiatrists and

other experts will be called to testify about the films in question. Do you have any bias or prejudice against or would you tend to disbelieve a psychologist or psychiatrist simply because of their work?

109. Does the fact that an individual earns his living by dealing in and with adult material disturb or offend you?

110. If chosen to sit as a juror, you will be caused to view films wherein certain sexual activity is graphically and explicitly portrayed. Does this prospect cause you any discomfort or embarrassment?

111. Will you be able to view films which depict certain sexually explicit activities, including mouth and genital contact, anal intercourse, ejaculation, homosexual activity and interracial sex with open eyes and an open mind?

112. Will you base your judgment as to the merits of the films exclusively upon the films themselves and the evidence as pre-

sented to you in court and not upon your own personal taste and personal standards as to what may or may not be obscene?

113. Have you read or heard about any polls, surveys or studies taken with reference to American adults' views on obscenity or pornography?

114. Which, if any, of the following movies have you seen:

Misty Beethoven

Deep Throat

Devil in Miss Jones

Behind the Green Door

The Story of O

The French Connection

Expose me, Lovely

Last Tango in Paris

Emmanuelle

The Sailor Who Fell From Grace With The Sea.

115. Which, if any, of the following material have you read:

Fear of Flying

Human Sexual Response

What You Always Wanted to Know About

Sex, But Were Afraid To Ask

Playboy

The Story of O

The Hite Report

The Joy of Sex

Viva

Penthouse

The Sensuous Woman

Oui

Playgirl

Scientific or psychology magazines

or journals.

116. Do you presently have an opinion as to what materials adults should be allowed to see and read?

117. Has any organization to which you belong advocated a change in the obscenity laws? If so, do you realize that the law must be changed by the legislature and not

by you as a juror, and that you must follow the law as the Court instructs?

118. The Court will ins-ruct you at the close of the case that you must find three elements to exist beyond a reasonable doubt before you can find material obscene. If you are satisfied that any two of the elements are proved but you have a reasonable doubt about the third, will you, nevertheless, vote for acquittal?

119. What organizations do you belong to in the community?

120. In this case you will be asked to view films depicting males engaging in himosexual sexual activity. Are you personally familiar with the attitudes and norms of the homosexual community?

121. If you conclude the films in this case are directed solely at a homosexual audience, would you be willing to follow the Court's instruction to judge whether the films appeal to the morbid, sick or shame-

ful interest of homosexuals?

122. Do you believe your experience in inadequate to judge the appeal of these films to homosexuals unless expert testimony is presented?

Respectfully submitted

/s/ W. Michael Mayock

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IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

UNITED STATES OF AMERICA,

Plaintiff,

v.

WILLIAM WALTER, et al.,

Defendants.

No. 77-49-Cr-T-H

DEFENDANTS' CONSOLIDATED PROPOSED
JURY INSTRUCTIONS

* * *

DEFENDANTS' PROPOSED INSTRUCTION NO. 16

In order to find that matter is obscene, each of the following elements must be proved beyond a reasonable doubt:

1. It is matter taken as a whole, the predominant appeal of which to the average

adult person, applying contemporary standards for the entire United States, is to a prurient interest, that is, a shameful or morbid interest in (nudity) (sex) (or) (excretion); and

2. It is matter which taken as a whole goes substantially beyond the customary limits of candor in the United States in the description or representation of such matters; and

3. It is matter which taken as a whole is utterly without redeeming social importance.

* * *

DEFENDANTS' PROPOSED JURY INSTRUCTION NO. 18

For purposes of these instructions:

1. "Adult" means all persons of the age of 18 years or older.

2. "Contemporary community standards" refers to standards in existence at or about the time the films were seized.

3. "Social value" is a measure of usefulness of press materials to society as a

whole or any part thereof.

DEFENDANTS' PROPOSED JURY INSTRUCTIONS NO. 19

The predominant appeal to prurient interest is judged with reference to average adults unless it appears from the nature of the matter or the circumstances of its dissemination, distribution or exhibition, that it is designed for clearly defined deviant sexual groups, in which case the predominant appeal of the matter shall be judged with reference to its intended recipient group.

* * *

DEFENDANTS' PROPOSED JURY INSTRUCTION NO. 21

Because contemporary community standards may change from time to time, you may determine that no material is obscene at the present time when viewed by consenting adults.

Authorities: Miller v. California, 413 U.S. 15, 37 L.Ed. 2d 419.

DEFENDANTS' PROPOSED JURY INSTRUCTION NO. 22

The term "average adult person" as used in these instructions is a hypothetical composite person who typifies the entire community.

ty including persons of both sexes; the religious and the irreligious; of all nationalities and all adult ages; all economic, educational and social standings; neither a libertine nor a prude, but with normal, healthy, average contemporary attitudes, instincts and interests concerning sex.

"Adult" means all persons of age of 18 years or older.

DEFENDANTS' PROPOSED JURY INSTRUCTION NO. 23

The material must be measured by its appeal to the average adult only, and not by their appeal to minors, or highly susceptible persons. Because the adult population of the Nation cannot be reduced in reading or viewing only what is fit for children, you must not, under any circumstances, consider the impact you believe the publications might have on children.

In connection, I call your attention to the fact that the evidence shows that the material was to be sold and/or exhibited only to adults.

Authorities: Roth v. United States, 354 U.S. 476, 77 S.Ct. 1304; Redrup v. New York, 386 U.S. 767, 87 S.Ct. 1414; Butler v. Michigan, 352 U.S. 380.

DEFENDANTS' PROPOSED JURY INSTRUCTION NO. 24

You must not consider the effect, if any, this material will have upon the unbalanced or highly susceptible person, but must consider only its effect upon the average adult person. Authority: Roth v. United States, 354 U.S. 476 at 488 (1957).

* * *

DEFENDANTS' PROPOSED JURY INSTRUCTION NO. 27

CALJIC 16.186 MODIFIED

Hamling v. U.S., 418 U.S. 87, 103-104 (1974)

The contemporary community standard referred to in these instructions is set by what is, in fact, acceptable to the adult community as a whole, not by what some person or persons may believe the adult community as a whole ought to accept. Ascertainment of the standard must be based upon an objective determination of what affronts, and is unacceptable

to, the adult community as a whole. While your own personal, social or moral views on material such as that charged in the complaint may not be considered, each of you is entitled to draw on your own knowledge of the views of the average adult person in the community if you can conceptualize such a person.

For the purpose of determining the prurient interest of the material here in question, the controlling adult community is the entire nation.

DEFENDANTS' PROPOSED JURY INSTRUCTION NO. 28

PC 311(a)(1)

The predominate appeal to prurient interest of each film in this case is judged with reference to average adults unless it appears from the evidence of the nature of the matter or the circumstances of its dissemination, distribution or exhibition, that it is designed for clearly defined deviant sexual groups, in which case the predominate appeal of such film shall be judged with reference

to its intended recipient group.

There has been some evidence in this case attempting to show that the intended and probable recipients of the films were members of deviant sexual groups. If you find from all the evidence that this was the case, then you are to determine whether the material in any or all the aforementioned films appeals to the prurient interest in terms of the average member of the deviant group and not the average adult person in the community.

DEFENDANTS' PROPOSED JURY INSTRUCTION NO. 29

If you find that certain films are directed at groups interested in hand and arm insertion or homosexuals and if you find that your experience is plainly inadequate to judge whether the material appeals to the prurient interest of the average adult member of such intended recipient group, then you must rely upon such expert testimony as was presented regarding what appeals to the prurient interest of the average adult member of such group.

If you determine either that the film in question did not appeal to the prurient interest of the average adult member of such intended recipient group or that the evidence was insufficient to enable you to make a determination one way or the other, then you must find the defendant not guilty as to those films. Paris Adult Theatre I v. Slaton, 413 U.S. 49, 56 n. 6 (1973) People v. Enskat, 33 Cal.App.3d 900, 914 (1973).

* * *

DEFENDANTS' PROPOSED JURY INSTRUCTION NO. 47

A film is not obscene merely because its subject matter may be contrary to the moral standards or predominant religious precepts of the Nation. Kingsley International Pic. Corp. v. Regents, 360 U.S. 684, 79 S.Ct. 1362.

DEFENDANTS' PROPOSED JURY INSTRUCTION NO. 48

The jury is instructed that if, upon the entire case, the jury is unable to ascertain the meaning of "the average adult person," or of "contemporary community standards,"

or the meaning of "prurient interest," or the meaning of "social importance," then the Government has failed to prove its case beyond a reasonable doubt. The jury is not permitted to guess at the meaning of these terms. If the jury is of the opinion that these elements are incapable of objective measurement, then the jury should return a verdict of not guilty. Memoirs v. Massachusetts, 383 U.S. 413, 86 S.Ct. 973; Palmer v. City of Euclid, 402 U.S. 544, 91 S.Ct. 1563.

* * *

DEFENDANTS' PROPOSED JURY INSTRUCTION NO. 54

In calculating the "average" adult person, all adults in the Nation must be included in the computation. For purposes of this computation, "average" means the mean and not the median or the mode.

CALJIC 16, 184. Roth v. U.S., 354 U.S. 476; Redrup v. New York, 386 U.S. 767; Butler v. Michigan, 352 U.S. 380; Interstate v. City of Dallas, 390 U.S. 676; Mishkin v. New York, 383 U.S. 502; J.P. Guilford, Fundamental Statis-

tics in Psychology and Education, at 62-63
(4th Ed. 1965).

W. Michael Mayock, Esq.
Penthouse Suite
10100 Santa Monica Boulevard
Los Angeles, California 90067

October 15, 1979

RE: William Walter v. United States,
No. 79-67; and
Arthur Randall Sanders, Jr., et al.
v. United States, No. 79-148

Dear Mr. Mayock:

The Court today took the following
action in the above cases:

"The petitions for writs of
certiorari are granted. The cases
are consolidated and a total of one
hour is allotted for oral argument."

Enclosed are memorandums describing the
time requirements and procedures under the
rules.

The additional docketing fee of \$50,
Rule 52(a), is due and payable in No. 79-67.

Very truly yours,

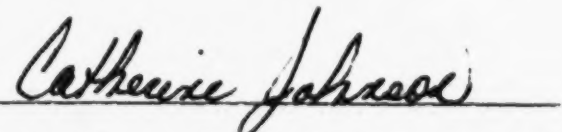
MICHAEL RODAK, JR., Clerk

By /s/ June M. Hoffmann
(Miss) June M. Hoffmann
Assistant Clerk

FILING AND MAILING CERTIFICATE OF PRINTER

I hereby certify that on December 6th, 1979 I filed with the Clerk's Office of this Court the required copies of this document and further certify that I mailed this same date from Richmond, Virginia the required copies to opposing counsel.

The necessary filing and mailing was performed in accordance with the instructions given me by counsel in this case.



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